U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

Date: May 22, 1998

Case No.: 97 INA 511

In the Matter of

UMINA BROTHERS, INC.,
Employer

in behalf of

RAUL L. SALONGA,
Alien

Appearance: R. L. Reeves, Esq., of Pasadena, California.

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of RAUL L. SALONGA ("Alien") by UMINA BROTHERS, INC., (Employer") under § 212 (a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) ("the Act"), and regulations promulgated thereunder at 20 CFR Part 656. After the Certifying Officer ("CO") of the U.S. Department of Labor at San Francisco, California, denied the application, the Employer appealed pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. The requirements include the responsibility of an Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On May 16, 1994, the Employer applied for alien labor certification on behalf of the Alien to fill the position of "Chief Cashier" in the Employer's firm, which was engaged in the business of marketing Wholesale Produce. AF 40. The position was classified as an "Cashier I," under DOT Occupational Code No. 211.362-010. The Employer described the job duties as follows:

> Engage in receiving cash or credit card payment for goods in excess of $15,000 daily. Keep records of funds received on invoices. Reconcile charge sales and cash receipts with total sales to verify accuracy of transaction. Approve checks for payment. Handle cash, checks and charge transactions on a wholesale basis for customers. Extends cash invoices and cash holds from customers. Complete credit card transactions. Keep President informed on all cash holds/hang-ups, negotiate checks, familiar with basic bookkeeping , organize invoices, charge invoices. Examine and count money, compare amounts with sales slips or cash receipts and make change.

AF 40 at Item 13. The minimum education for a worker to perform satisfactorily the job duties described in Item 13 of ETA Form 750A was completion of high school. The experience requirement was two years in the Job Offered or in the Related Occupation of Cashier/Bookkeeper. *Id.*, at Items 14 and 15.[2] Twenty-one U. S. job applicants responded after this position was advertised and posted, but the Employer rejected all of them. AF 25-35, 48, 52-84, 90, 101-139.

Notice of Findings. Subject to the Employer's rebuttal under 20 CFR § 656.25(c), the CO denied certification in the Notice of Findings ("NOF") dated May 16, 1996. AF 34-38. (1) Citing 20 CFR § 656.21(b)(2)(i)(A), the CO said the Employer had failed to offer sufficient evidence to justify its restrictive job requirements that candidates have two years' experience in the Job Offered and that the applicants be familiar with basic bookkeeping. AF 35. The Employer was instructed to delete the restrictive requirement and retest the job market, to prove that the restrictive requirements were consistent with common practice in the U. S., or

to prove the business necessity of its restrictive requirements.[3] (2) The NOF then said that U. S.

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[2]The hours were 1:00 AM to 10:00 AM in a forty hour week at $11.00 per hour, with time and a half fo overtime as needed.

[3]The CO cited **Information Industries, Inc.**, 88 INA 082.

workers Mitra and Tate were rejected because of undisclosed requirements. Employer claimed to rely on the standardized test that it administered at the time of each interview to assert that these U. S. workers lacked the ability to work out certain arithmetical calculations that the Employer alleged were essential to the performance of the job duties. By way of rebuttal the Employer was required to present probative evidence (1) that the Alien had taken and passed the same test under the same standards before he was hired, and (2) that the named U. S. workers lack the requirements stated in the Form ETA 750 A. AF 36. (3) The NOF cited 20 CFR § 656.21(b)(2)(ii) and said the CO must consider a U. S. worker qualified for the job if by education, training, experience, or a combination of these the worker is able to perform the duties of the occupation as these are customarily performed by other U. S. workers similarly situated. The CO found that the resumes or applications for the following U. S. applicants met the minumum requirements of the job: Mitra, Tate, Chacon, Bacu, and Aguilar. The NOF then directed the Employer to establish that each of the named U. S. workers was rejected for reasons that were lawful and job related.

Rebuttal. The Employer's July 29, 1996, rebuttal addressed the issues stated in the NOF. AF 09-33A. (1) Employer argued that its experience requirement was correct because it was consistent with the standard of the DOT for a Supervisor, Cashiers, Occupation Code No. 211.137-014, and that the CO's use of the DOT definition for a Cashier I under Code No. 211.362-010 did not contemplate that the worker would exercise the degree of discretion and responsibility that is involved in the Chief Cashier position. Relying on its definition as a Supervisor position, the Employer argued that the Specific Vocational Preparation for the Job Offered should be between two and four years of experience. The Employer admitted that its position differs in that its Chief Cashier does not supervise any other cashiers and is the only cashier in its business, but claimed that the circumstance that he reported directly to its president was sufficient to establish the equivalency between the position it offered and a supervisory position under the DOT. AF 10. In addition, the Employer argued that business necessity was proven by the substantial responsibilities it placed on this employee, which it combined with with minimal supervision. The Employer then relied on its officer's putative familiarity with the wholesale produce industry in the Greater Los Angeles area to contend that wholesalers "use only highly experience cashiers" and asserting that it Chief Cashier must be very quick and very accurate, it concluded that it had justified the business necessity of its requirement of two years' experience. In arguing further that its requirement that the worker be "familiar with basic bookkeeping" was not a restrictive requirement, the Employe reviewed the job duties of the position contending that they required the use of a balance sheet.
AF 11-12. The Employer admitted that it had administered "a standardized simple arithmetic test" to each applicant it interviewed, contending that applicants Mitra and Shynettte did not pass, and that the Alien did pass and that Mitra and Shynettte and U. S. workers Chacon, Bacu, Aguilar, and Nims were not hired for reasons relating to the job duties and the nature of the experience they offered and the Employer rejected.

Final Determination. The CO denied certification in the Final Determination issued on October 17, 1996. AF 06-08. The CO said under 20 CFR § 656.21(b)(2)(i)(A), that the Employer

failed to amend its experience and bookkeeping requirements, to document that its existing requirements were normal for this position, or to prove the business necessity of the restrictive requirements that it had stated, as explained in the NOF. AF 07. The CO also discussed the Employer's response to the NOF findings that it had rejected qualified U. S. workers who had applied for the job. The rebuttal prepared by the Employer's attorney, said the CO, was insufficient in that any refutation of the NOF was entirely that of the attorney and not of the Employer. Concluding that the assertions by counsel do not constitute evidence of which the Board can take cognizance, the CO denied alien labor certification. AF 08.

Appeal. Following the denial of certification, on November 21, 1996, the Employer requested review of the Final Determination, submitting written arguments by the Employer together with substantially the same evidence that it submitted in the rebuttal.

Discussion

While an employer may adopt any qualifications it may fancy for the workers it hires in its business, it must comply with the Act and regulations when employer seeks to apply such hiring criteria to U. S. job seekers in the course of testing the labor market in support of an application for alien labor certification. This Employer's hiring requirements conflicted with the explicit provisions of the DOT for Specific Vocational Preparation for the position under the DOT, and the Employer seeks to support its criteria by contending that the job of Chief Cashier is equal to the supervisory position described in the DOT on which it relied to justify its argument.

The Board held in **Information Industries**, 88 INA 082 (Feb. 9, 1989)(*en banc*), that a restrictive requirement requires an employer to establish that (1) the restrictive requirement bears a reasonable relationship to the occupation in the context of its business and (2) the skills stated in that restrictive requirment are essential to performing in a reasonable manner the job duties described in its application for alien labor certification. The CO said Employer had failed to present rebuttal evidence because its entire rebuttal was an unsupported statement by its attorney, which the Employer's officer's signature verified without offering any factual evidence. As this clearly was not a statement based on fact, the CO found the Employer's rebuttal to be unpersuasive. While the CO is not required to accept as credible or true the written statements an employer has supplied in lieu of independent documentation, in considering them the CO must give the employer's statements such weight as they rationally deserve. Because the bare assertions the lawyer's statements offered were given without supporting evidence beyond the Employer's own signature, they clearly were insufficient to carry its burden of proof. **Gencorp**, 87 INA 659 (Jan.13, 1988)(*en banc*).[4] Although it could be said that the Employer ostensibly complied with the directions to file evidence supporting its position on the issues the NOF raised in this case, the facts sought were not disclosed by the Employer's vague assertions, which offered no explicit data, specific examples, or anything other than general statements that appeared

[4]To the same effect see **Our Lady of Guadalupe School**, 88 INA 313 (Jun. 2, 1989); **Inter-World Immigration Service**, 88 INA 490 (Sep. 1, 1989), and **Tri-P's Corp.,** 88 INA 686 (Feb. 17, 1989)..

unconnected with tangible data.

Against this background the DOT description of the work of a Cashier I under Code No. 211.362-010 has been compared with the DOT description of the job duties of a Supervisor, Cashiers, Occupation Code No. 211.137-010. The work of a Cashier I closely parallels the duties described in the Employer's Form ETA 750 A, while the duties of a Chief Cashier or a Supervisor of Cashiers are materially different. The primary function of the position Employer's application described is not to supervise and coordinate the activities of other workers who are performing duties that are clearly similar to the duties described in DOT Occupation Code No. 211.362-010. Consequently, the panel has concluded that the rejection of Employer's application for alien labor certification by the CO is supported by the evidence of record, and that the denial of alien labor certification should be affirmed.

Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five,

double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.